Supreme Court, U.S.
FILED
JUN 07 2007
OFFICE OF THE CLERK

No. 06-961633

IN THE

Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES and HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE and GAYLE B. UILKEMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY D. CHANDLER
ALLIANCE DEFENSE FUND
101 Parkshore Drive
Suite 100
Folsom, CA 95630
(916) 932-2850

TERRY L. THOMPSON
LAW OFFICES OF
TERRY L. THOMPSON
P.O. Box 1346
Alamo, CA 94507
(925) 855-1507

BENJAMIN W. BULL
Counsel of Record
JORDAN W. LORENCE
GARY S. MCCALEB
KEVIN THERIOT
ALLIANCE DEFENSE FUND
15333 N. Pima Road
Suite 165
Scottsdale, AZ 85260
(480) 444-0020

Attorneys for Petitioners

QUESTIONS PRESENTED

The official policy of the Contra Costa County, California Library Board permits community groups to use its meeting rooms for "educational, cultural and community-related programs and activities," but prohibits "religious services" while allowing "religious speech," such as lectures on how to pray. Faith Center Evangelistic Ministries applied to hold two meetings at the Antioch Library meeting room for "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up the Community." After permitting the first meeting, the County denied Faith Center permission for the second meeting because of its religious content. A divided Ninth Circuit panel upheld the exclusion of "religious services" from the meeting rooms and vacated the district court's preliminary injunction in favor of Faith Center. The Ninth Circuit denied rehearing en banc over the dissent of seven judges. The questions presented are:

1. Whether the First Amendment allows the County -- in conflict with a decision by the Second Circuit -- to prohibit expression called "religious services" but permit other religious speech in a forum generally open to community groups for expressive activities?

2. Whether the Ninth Circuit erred in holding -- in conflict with decisions by the First, Third, Fourth, Fifth and Eighth Circuits -- that government facilities opened broadly by policy to community groups for "educational, cultural and community-related programs and activities," are not a "designated public forum" but instead are a "limited forum," from which the government may exclude private religious expression, such as "religious services?"

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

OPINIONS BELOW 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1, 2

REASONS FOR GRANTING THE PETITION 12

I. THE NINTH CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES" AND "RELIGIOUS SPEECH" 13

A. The Ninth Circuit's Decision Conflicts With A Decision of the Second Circuit In A Similar Case.. 13

B. This Court Should Take This Case To Clarify That Its Reference to "Mere Religious Worship" In *Good News Club* Did Not Create A Less-Protected Category of Speech That Government May Ban From Its Forum. 16

II. THE NINTH CIRCUIT'S DECISION THAT A FORUM OPENED BROADLY FOR ADVOCACY IS ONLY A "LIMITED FORUM" FROM WHICH THE GOVERNMENT MAY EXCLUDE RELIGIOUS EXPRESSION CONFLICTS WITH THE RULINGS BY THE FIRST, THIRD, FOURTH, FIFTH AND

EIGHTH CIRCUITS. 22

A. Other Circuits Have Held Unconstitutional Government Exclusion of Religious Expression From Forums Opened by Policies Similar to This One. 23

B. The Policy Does Not Create A Limited Forum. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Adderley v. Florida,
385 U.S. 39 (1966) 23

Bronx Household of Faith v. Board of Education of the City of New York, 331 F.3d 342 (2d Cir. 2003) ... 6, *passim*

Capitol Square Review Board v. Pinette,
515 U.S. 753 (1995) 20

Chess v. Widmar,
635 F.2d 1310 (8th Cir. 1980) 24

Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library,
883 F.2d 32 (5th Cir. 1989) 26

Cornelius v. NAACP Legal Defense and Education Fund, Inc.,
473 U.S. 788 (1985) 23

Country Hills Christian Church v. Unified Sch. Dist. No. 512,
560 F.Supp. 1207 (D.Kan. 1983) 27

Fairfax Covenant Church v. Fairfax County School Bd.,
17 F.3d 703 (4th Cir. 1994) 25, 26

Good News Club v. Milford Central Schools,
533 U.S. 98 (2001) ..... 7, *passim*

Grace Bible Fellowship v. Maine School Admin. Dist. No. 5,
941 F.2d 45 (1st Cir. 1991) 24

Gregoire v. Centennial School District,
907 F.2d 1366 (3rd Cir. 1990) 25

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) 9, 22, 28

Madison Joint Sch. Dist. v. Wis. Employment Relations Comm.,
429 U.S. 167 (1976) 23

Perry Education Association v. Perry Local Educators' Assoc.,
460 U.S. 37 (1983) 23

Randall v. Pegan,
765 F.Supp. 793 (W.D.N.Y. 1991) 27

Shumway v. Albany School District No. 1,
826 F.Supp. 1320 (D.Wyo. 1993) 27

Verbena United Methodist Church v. Chilton Cty. Bd. of Ed.,
765 F.Supp. 704 (M.D.Ala. 1991) 27

Wallace v. Washoe County School District,
818 F.Supp. 1346 (D. Nev. 1991) 26

Widmar v. Vincent,
454 U.S. 263 (1985) ..... 10, *passim*

STATUTES:

28 U.S.C. §1254 1

OPINIONS BELOW

The Ninth Circuit's order of March 9, 2007 revising the panel decision is reported at 480 F.3d 891 and appears in the Appendix at 1a. The opinion of the U.S. District Court for the Northern District of California granting the petitioners' motion for a preliminary injunction is unreported and appears in the Appendix at 66a. The Ninth Circuit's order of March 9, 2007 denying the petition for rehearing en banc and suggestion for rehearing, and the dissent of seven judges, appears at Appendix 87a.

JURISDICTION

The Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc on March 9, 2007. App. 87a. The Ninth Circuit issued the panel decision on September 20, 2006, and the full court revised the panel decision on March 9, 2007. App. 1a. This Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendments I and XIV, are found in the Appendix at 105-107a. The facilities use policy for the Contra Costa County Library Board is found in the Appendix at 108a.

STATEMENT OF THE CASE

Faith Center Evangelistic Ministries ("the Church"), an evangelical Christian church, applied to rent the meeting room at the public library in Antioch, California. Contra Costa County operates the library and the meeting rooms, which it opens generally to the public for expression. The Church desired to meet two different days for meetings that would consist of "Prayer, Praise and Worship Open to the Public,

Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up [the] Community." App. 4a. Participants at Faith Center's meetings generally "(a) discuss educational, cultural, and community issues from a religious perspective; (b) engage in religious speech and religious worship; and (c) engage in discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues." *Id.*

County Library's Meeting Room Policy

Contra Costa County by policy broadly opens the library meeting rooms at its various branches to a wide spectrum of expression by community groups. App. 108-109a. Specifically, "It is the policy of the Contra Costa County Library to encourage the use of library meeting rooms for educational, cultural and community related meetings, programs, and activities."*Id.* The policy applies to all of the branch libraries, including the meeting room at the Antioch Branch Library in Antioch, California. App. 3a. The meeting room is available for use by community groups during library business hours on a first-come, first-served basis. App. 3a.

County Library's Practice of Allowing A Broad Range Of Community Groups to Use Library Meeting Rooms

In practice, a broad array of community groups use library meeting rooms for many different kinds of expression and advocacy, including:

- East Contra Costa Democratic Club to present issues and candidates to members;

- Sierra Club for letter writing;

- Narcotics Anonymous for recovery from drugs;
- Jewish Family and Children's Services of the East Bay women's group to dialogue with multicultural groups;
- Moraga Historical Society;
- Bucks & Ducks, Inc. for monthly business;
- Walden Park Homeowners Association for a board of directors meeting;
- Moragans for Housing Options for advocacy for a variety of housing in Moraga and updating members and public on town plans
- IPMS Plastic Modelers to promote plastic modeling;
- Boy Scout Troop 153 for planning;
- Girls Scouts of Walnut Creek for event planning; and
- Concord Art Association to bring art to the public and for a business meeting.

Appellees' Supplemental Excerpts of Record (Ninth Circuit), pp. 2-15.

The County's History of Anti-Religious Speech Policies

The County Library's current policy at issue in this case prohibits use of library rooms for "religious services." This current policy springs from a history of policies that expressly

discriminated against religious expression in these meeting rooms since at least 1992. First, the County Library's policy, Resolution No. 92/793, stated that "[l]ibrary meeting rooms shall not be used for religious purposes." App. 69a. The County replaced that policy with Resolution No. 93/525, which forbade the use of library meeting rooms for "religious services or activities." *Id.* Then the County enacted the current policy, Resolution No. 2004/655, which states that "[l]ibrary meeting rooms shall not be used for religious services." App. 108a. However, the County Library allows religion, as a topic, to be discussed in library meeting rooms. App. 75a.

Faith Center and Its Meeting Applications

Faith Center is led by Pastor Hattie M. Hopkins. App. 4a. Pastor Hopkins believes that there are many people who need to hear the gospel of Jesus Christ, but are reluctant to set foot inside a traditional church building. *Id.* Thus, Pastor Hopkins holds organized meetings in non-traditional buildings under the auspices of Faith Center. *Id.* Participants in Faith Center's meetings discuss educational, cultural, and community issues from a religious perspective by engaging in religious speech, including teaching and discussion about the Bible and other religious books, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues. *Id.*

In May 2004, Pastor Hopkins submitted two applications to use the County Library's meeting room on May 29, 2004, and July 31, 2004. *Id.* These two applications indicated that the purpose of Faith Center's meetings was "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up Community."*Id.* Library officials approved the two meetings. *Id.*

Faith Center planned to advertise its May 29, 2004 meeting at the County Library with a flyer that presented its "Women of

Excellence Conference." App. 4a. The flyer included a schedule for the following activities: registration; then a session called, "Wordshop," which was a lecture on how to pray, then refreshments; and then a session containing praise and worship with a sermon. App. 5a.

Faith Center's May 29, 2004 Meeting

On May 29, 2004, Pastor Hopkins held the planned "Prayer, Praise and Worship" meeting at the Antioch Library's meeting room. App. 5a. Out of consideration for the County Library's patrons, Faith Center participants did not use musical instruments or amplified sound. *Id.* Toward the end of the meeting, County Library officials informed Faith Center representatives that groups were not permitted to use library meeting rooms for religious activities. *Id.* Pastor Hopkins asked if the reason for prohibition was because of any excessive noise resulting from the Faith Center meeting. *Id.* The County Library officials said noise was not the problem, but rather the religious content of the meeting. App. 5a. The County Library officials then showed Pastor Hopkins the current policy that states that "[l]ibrary meeting rooms shall not be used for religious purposes." App. 69a.

After a series of phone calls and letters, the County Library officials informed Pastor Hopkins that Faith Center could not meet for its second meeting planned for July 31, 2004 and that the reservation would be removed from the calendar. App. 6a and 72a. The County later stated that the Church could have met for the "wordshop" portion of the meeting, because it contained religious teaching on prayer and not worship, but could not meet for the portion of the meeting where the Church engaged in "praise and worship." App. 7a and 90a.

Pastor Hopkins wants to hold future meetings at the Antioch Library meeting room approximately one Saturday every other

month, from 11 a.m. to 3 p.m. App. 72a. Absent the preliminary injunction issued by the District Court, Pastor Hopkins cannot access the Antioch Library meeting room under the County Library's current policy, which forbids the use of library meeting rooms for "religious services." App. 108a - 109a. The County Library applies the "religious services" prohibition to encompass the content of Faith Center's meeting of "prayer, praise and worship."

The District Court Opinion

The District Court granted the Church's motion for preliminary injunction in an opinion dated May 23, 2005. App. 85a. The District Court ruled that the County had engaged in viewpoint discrimination by excluding a worship service that was not "mere worship." App. 72a-83a. Some of the activities the Church engaged in at the library meeting room in the May 29, 2004 meeting "were permissible," the District Court ruled, App.77a, for example, "[p]laintiffs discussed otherwise permissible topics from a religious viewpoint." *Id.*

The District Court relied on the Second Circuit's decision in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003). In *Bronx Household*, the Second Circuit upheld a preliminary injunction enjoining the New York City public schools' policy barring "religious services or instruction" from a forum opened to community groups for use after hours for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Bronx Household of Faith*, 331 F.3d at 348.

The District Court relied on *Bronx Household of Faith* and the approach the Second Circuit did of examining the component parts of what the church did in its "service." The District Court granted the preliminary injunction because of the

similarity between the specific expressive activities that the church did in *Bronx Household, e.g.*, "the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies, and social fellowship among the church members," App. 78a-79a, quoting 331 F.3d at 347, and the expressive activities at the meeting in *Faith Center.* The District Court stated:

> The Second Circuit concluded that the plaintiffs were substantially likely to prevail on their First Amendment claims because the court found "no principled basis on which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that [plaintiffs] have proposed for [their] Sunday meetings." *Id.* at 354. Recognizing that some of plaintiffs' proposed activities, such as prayer, singing of Christian songs, and communion, were "quintessentially religious," the court also noted that the plaintiffs' meetings encompassed secular elements, like a fellowship meal. The court concluded that "[o]n these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values." *Id.*

District Court Opinion, App. 78a. The District Court granted the preliminary injunction against the County's anti-religion policy, and the County appealed to the Ninth Circuit.

The Ninth Circuit Opinion

By a 2-1 vote, the Ninth Circuit vacated the preliminary injunction granted by the District Court and upheld the County's policy. The Ninth Circuit ruled that the County could ban "mere religious worship" under *Good News Club v. Milford*

Central Schools, 533 U.S. 98 (2001), and that the County's policy did just that. App. 28a - 29a. The County did not engage in unconstitutional viewpoint discrimination, the Ninth Circuit ruled., although it acknowledged that some of the Church's expression could not be excluded from the forum, e.g., the lecture on prayer, the Church had designated one session as "prayer, praise and worship." Because the Church had defined one portion of its meeting essentially as "pure religious worship," the County could exclude it under *Good News Club.* "Faith Center's afternoon activities on May 29, 2004, as described by Faith Center itself, consisted entirely of praise and religious worship," App. 31a., and therefore, could be excluded by the County.

The Ninth Circuit upheld this exclusion by finding that the County had created only a "limited forum," so the exclusion of religious services need only be "viewpoint neutral and reasonable in light of the purpose served by the forum." App.18a-19a. The Ninth Circuit found the exclusion of "religious services" reasonable.

The Ninth Circuit ruled that even though the County opened the meeting rooms for a "broad purpose" of "meetings, programs, or activities of educational, cultural or community interest," the County did not show "an intent to create a public forum by designation," App. 16a. The Ninth Circuit agreed with the County that allowing a religious service in this forum would be inconsistent with the County's purpose "to preserve the character of the forum as a common meeting space, an alternative to the community lecture hall, the corporate board-room, or the local Starbucks." App.19a.

The Ninth Circuit found the religious exclusion reasonable "in light of the library policy so that the Antioch forum is not transformed into an occasional house of worship." App.19a. Religious groups are controversial, the Ninth Circuit stated, so

it is reasonable for the County to exclude them from this forum. "The County reasonably could conclude that the controversy and distraction of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community." App. 20-21a.

The Ninth Circuit ended by distinguishing between "religious worship," which can be excluded from the forum, and "religious speech," which cannot. "To that end, the County invited the district court to craft an injunction that ensured Faith Center's right to conduct activities in the meeting room that express a religious viewpoint, and allowed the County to exclude religious worship services." App. 36-37a. The Ninth Circuit vacated the preliminary injunction and remanded to the District Court to "craft an appropriate injunction after soliciting the views of the parties." *Id.*

Judge Karlton's Concurrence

Judge Karlton, a district court judge sitting by designation, wrote a concurring opinion sharply criticizing this Court's equal access doctrine. He criticized this Court's decisions in *Good News Club* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) because they are based on "the High Court's purported inability to distinguish between a sermon and a speech," App. 38a. He said these cases "simply do not" present situations of viewpoint discrimination because "religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech." *Id.* Judge Karlton criticized this Court's equal access doctrine because it does not use the Establishment Clause to exclude religious expression from government forums. By permitting this private religious expression in a public forum, the government fails to recognize "the passions that deeply-held

religious views engender" App.39a. For example, in Northern Ireland, "Catholics and Protestants kill each other in an effort to establish governmental power," *id.*. "In Iraq, where Shi'a and Sunni engage in similar slaughter," *id.*, and several other similar examples. He ended his opinion by stating that "I concur in the opinion because, as a subordinate judge, it is my duty to adhere to the precedent of the Supreme Court 'no matter how misguided.'" (Citation omitted). App. 40-41a.

Judge Tallman's Dissent

Judge Tallman dissented from the panel's decisions vacating the preliminary injunction. He stated that the County engaged in "viewpoint discrimination" by "exclud[ing] certain members of the community from engaging in activities that fall squarely within the policy's scope by examining the way an applicant's viewpoints are expressed." App. 41-42a. He said that the majority opinion conflicted with this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 23 (1981) and the Second Circuit's decision in *Bronx Household of Faith*, which permitted religious groups to meet for worship services in forums opened under policies similar to the one here. App. 56a -60a.

Judge Tallman further criticized the majority's "strange rule that '[r]eligious worship services can be distinguished from other forms of religious speech by the adherents themselves'" that "creates a system whereby the applicant itself decides what constitutes worship." App. 48a. He wrote that this creates excessive entanglement problems under the Establishment Clause because "the County will still have to determine what is and what is not religious worship in instances where a group does not identify in such detail its activity." App. 48a.

Judge Tallman also pointed out that the majority erred by invoking the "mere religious worship" language from *Good News Club* to uphold the County's policy. "Faith Center has

never claimed that its services are *mere* religious worship, devoid of speech on permissible secular topics." App. 59a.

Judge Bybee's Dissent for Seven Judges From the Ninth Circuit's Denial of Rehearing En Banc

Judge Bybee, writing for himself and six other judges, dissented from denial of rehearing en banc:

> The panel majority's decision permits the government to single out what it calls "mere religious worship" for exclusion from a forum that it has opened broadly for use by community and cultural groups. In so doing, the majority has disregarded equal-access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups.

App. 88a - 89a.

Judge Bybee criticized the majority opinion for upholding the County's actions here when "the County's sole basis for excluding Faith Center from the library was the religious character of its speech activities." App. 92a. By upholding this exclusion of religious services, Judge Bybee wrote, "the majority has effectively relegated religious worship to an inferior status vis-à-vis community and cultural speech that claims a secular component." *Id.*

The majority's opinion creates Establishment Clause concerns, Judge Bybee wrote, because it treats various religions differently due to the fact that they define and engage in "worship" differently. "Under the majority's approach, a diverse range of religions may use the County's library meeting rooms for 'religious services' without fear of County censorship because their services cannot be characterized as 'mere

worship.'" App. 101a. Judge Bybee argued that the Ninth Circuit en banc should have granted review and reinstated the District Court's preliminary injunction.

REASONS FOR GRANTING THE PETITION

This Court should grant review and reverse the two major errors in the Ninth Circuit's *Faith Center* opinion. First, the decision unconstitutionally distinguishes between "religious services," [worship], which the County may ban from the forum, and religious speech, which it cannot ban. App. 32a-36a. This Court rejected such a distinction in *Widmar v. Vincent*, 454 U.S. 263 (1981).

Religious worship is not a second class form of expression that the government may ban from a forum generally open for indistinguishable "secular" expression. The Ninth Circuit's decision squarely conflicts with the Second Circuit's ruling in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003), which permitted a church to meet for Sunday morning services in a forum similarly open broadly to community groups and to engage in expressive activities similar to the ones here.

The Ninth Circuit's aberrant reasoning leads to inconsistent results that violate the First Amendment. For example, the Ninth Circuit spoke approvingly of the County's policy and practice permitting the Church to give a lecture about prayer, one that "teach[es] people how to pray or communicate with a divine presence," App. 36a, as long as it is not a "religious service." The Ninth Circuit spoke approvingly that the County permits private groups to "engage in discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues," App. 27a, as long as those component parts

do not aggregate into a whole constituting a forbidden "religious service." The County's arbitrary and inconsistent policy violates the First Amendment.

The second major error that invites this Court's review is the Ninth Circuit's ruling that a forum opened broadly for expression by a wide range of community groups and subject matter is only a "limited forum," not a "designated public forum." This means that any exclusions from the forum, such as one here barring "religious services," are judged only by a permissive reasonableness and viewpoint neutrality standard, not the strict scrutiny of the compelling state interest standard. This led the Ninth Circuit to reject the Church's claim of content-based and viewpoint discrimination because "[r]eligious worship, on the other hand, is not a viewpoint, but a category of discussion within which many different religious perspectives abound." App. 29a.

These major errors conflict with this Court's equal access decisions, such as *Widmar v. Vincent,* 454 U.S. 263 (1981) and *Good News Club v. Milford Central Schools,* 533 U.S. 98 (2001). The exclusion of religious services from a forum generally open for indistinguishable "secular" expression violates the First Amendment's Freedom of Speech Clause.

I. THE NINTH CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES" AND "RELIGIOUS SPEECH"

A. The Ninth Circuit's Decision Conflicts With A Decision of the Second Circuit In A Similar Case.

The Ninth Circuit decision here conflicts with the Second Circuit decision in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003),

and this Court's decision in *Widmar* by distinguishing between "religious services" [worship], and "religious speech." The Ninth Circuit essentially ruled that religious worship is less protected under the First Amendment and can be banned from a forum, while religious speech or discussion has more protection and must be permitted. App. 32a-36a. This distinction flatly collides with this Court's decision in *Widmar* which addressed that specific question and ruled that religious worship and religious speech are both equally protected by the First Amendment:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious worship** and **discussion**. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added). *See also Widmar*, 454 U.S. at 269, n. 6 (specifically rejecting the distinction between worship and other speech).

The Ninth Circuit's decision conflicts with the Second Circuit's decision in *Bronx Household of Faith*. Judge Tallman, in his dissent, stated that "*Bronx Household* parallels this case in many ways and is instructive on the interpretation of the precedent set by *Good News Club.*" App. 57a. The Bronx Household of Faith, a local church, applied to rent space in a New York City public school for Sunday morning meetings that Judge Tallman wrote "can fairly be described as religious worship," *id.*, citing to *Bronx Household,* 331 F.3d at 345. The New York City Board of Education had a policy similar to the one at issue in this case, which permitted community groups to meet in school buildings during nonschool hours for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Id.* at 348.

The Bronx Household of Faith described the component parts of its Sunday morning meeting as "the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members." *Id.* at 347. Bronx Household of Faith sought a preliminary injunction to permit it to meet in a New York City public school and also to enjoin the policy's ban on "religious services or religious instruction" by community groups meeting during nonschool hours. *Id.* at 346. The District Court granted the preliminary injunction, and the Second Circuit affirmed. *Id.* at 348, 357.

The Second Circuit relied on *Good News Club* to uphold the preliminary injunction because the expressive activities the church did in the New York schools after hours is similar to the activities the religious group did in *Good News Club*. This Court in *Good News Club* characterized the Club's activities as "the teaching of morals and character development from a particular viewpoint," 533 U.S. at 111. The Second Circuit stated that this characterization "cannot be divorced from Justice Souter's detailed description [in his dissent] of the Club's activities [as worship] that the majority adopted as accurate." *Bronx Household*, 331 F.3d at 354 (citing *Good News Club*, 533 U.S. at 112, n.4). The Second Circuit could not find any "meaningful distinction" between the activities engaged in by Bronx Household and the activities done by the group in *Good News Club*.

In this case, the District Court granted the preliminary injunction by relying on the Second Circuit's decision in *Bronx Household of Faith*. App.77a. The District Court found that the County had engaged in viewpoint discrimination, as this Court found in *Good News Club*. App. 77a-80a.

Here, in sharp contrast to the Second Circuit, the Ninth Circuit tried to parse the parts of Faith Center's meetings into those containing protected "religious speech" from those containing excludable "religious worship." App. 26a-27a. The Ninth Circuit remanded the case back to the District Court to fashion a preliminary injunction allowing the aspects of Faith Center's meetings that contain religious speech, but excluding those containing "religious worship." App. 36a - 37a.

The Ninth Circuit's decision cannot be reconciled with the Second Circuit's decision in *Bronx Household of Faith.* As Judge Tallman stated in his dissent, "[t]he only differences between the church's activities in *Bronx Household* and those of Faith Center is that the Bronx Household church did not call its activities 'worship' and failed to conveniently separate on a flyer the 'worship' portion of its activities with a fellowship meal discussing secular topics." App. 59a.

This Court should grant review to determine whether the First Amendment permits the County to single out religious services or "worship" for exclusion from a forum generally open to community groups to engage in expression indistinguishable from that of Faith Center.

B. This Court Should Take This Case To Clarify That Its Reference to "Mere Religious Worship" In *Good News Club* Did Not Create A Less-Protected Category of Speech That Government May Ban From Its Forum.

This Court's reference to "mere religious worship" in footnote 4 of *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), has been misinterpreted by the lower courts to mean that the government may (or must) single out "mere religious worship" and exclude it from a forum generally open for expression. The Ninth Circuit here and the Second Circuit

in *Bronx Household* both wrestled with that language from *Good News Club,* and came to similar conclusions that "mere religious worship" is a genus of less-protected speech that may be banned from a forum open generally for expression.

This Court in *Widmar* rejected the notion that "religious worship" is a separate and inferior form of expression different than "religious speech," and held that, the government may ban "religious worship" from a public forum. *See Widmar*, 454 U.S. at 269, n.6. However, the Ninth Circuit dismissed this passage from *Widmar* (App. 32a-33a) and erroneously concluded that the government may ban worship services from a forum generally opened to all because of the "mere religious worship" language in footnote 4 of *Good News Club.* App. 25a-29a. This Court should grant review to clarify that the reference to "mere religious worship" in *Good News Club* does not overrule the substantive discussion and rejection of the "religious worship/religious speech" division in *Widmar.*

The "mere religious worship" language in question from *Good News Club* appears in footnote 4:

> Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,' " *id.*, at 511. **In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.**

Good News Club, 533 U.S. at 112 n. 4 (emphasis added)

The Ninth Circuit interpreted the phrase, "mere religious worship" as establishing a separate category of expression that may be excluded from a forum:

> Second, the Court drew a distinction between the Club's activities and "mere religious worship, divorced from any teaching of moral values." *Id.* at 112, 121 S.Ct. 2093 n. 4. Although the school district contended that the Club's activities constituted religious worship, the Court rejected that characterization and noted that the court of appeals made no such determination. The Court drew a line at religious worship because it did not regard worship in this case as merely a "viewpoint from which ideas are conveyed." *Id.* To the contrary, pure religious worship held a purpose unto itself, and it exceeded the boundaries of a forum limited to a discussion of the moral and character development of children. *See id.* at 138 n. 3, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (Souter, J., dissenting).

App. 25a-26a. The Ninth Circuit used this supposedly meaningful distinction to uphold the County's policy excluding "religious services." The Ninth Circuit parsed through each aspect of Faith Center's event, deciding that the Church could engage in "discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues," App. 27a, because these were similar to subjects discussed by other groups using the meeting rooms. App. 27a-28a.

The Ninth Circuit upheld the County's policy barring "religious services" by assuming that it was the same as "mere religious worship" referred to in *Good News Club*. "Faith Center's afternoon activities on May 29th, however, did not consist of religious viewpoint activities. Faith Center occupied the Antioch forum expressly for 'praise and worship' and in

doing so Faith Center exceeded the boundaries of the library's limited forum. The district court understood, and Faith Center did not dispute, the contention that the afternoon activities constituted pure religious worship services." App. 28a (emphasis added).

Although the Second Circuit in *Bronx Household of Faith* reached the right result in upholding the injunction invalidating the New York City Board of Education's policy banning "religious services and instruction," it showed the same confusion over whether the reference to "mere religious worship" in *Good News Club* means that government may single out "mere religious worship" and exclude it from a forum generally open to the public. The Second Circuit stated:

> The [Supreme Court] majority [in *Good News Club*] did not say that the meetings were somehow distinct from worship services, but simply observed that they were not **"mere religious worship**, divorced from any teaching of moral values." *Id.* at 112 n. 4.
>
> We find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B.... On these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute **only religious worship**, separate and apart from any teaching of moral values. 533 U.S. at 112 n. 4, 121 S.Ct. 2093.

Bronx Household of Faith, 331 F.3d at 354 (emphases added).

The reference to "mere religious worship" in *Good News Club* has eclipsed this Court's thorough discussion in *Widmar* recognizing full First Amendment protection for "religious

worship," just as it protects "religious speech." This Court should grant review in order to direct the lower courts back to *Widmar* on this point to clear up the confusion created by the "mere religious worship" reference in *Good News Club.*

In *Widmar,* this Court devoted an extensive footnote explaining three reasons why religious worship and religious speech are both equally protected under the Free Speech Clause. *See Widmar*, 454 U.S. at 269, n. 6. The Ninth Circuit dismissed *Widmar*'s reasoning as mere "dicta that was not central to the Court's holding," *Faith Center*, 462 F.3d at 1212, App. 32a. But this Court repeated this principle in its majority opinion of *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995):

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, **or even acts of worship**, *Widmar, supra* at 269, n. 6.

Pinette, 515 U.S. at 760. (emphasis added).

The first reason this Court gave in *Widmar* was that there is no intelligible way for First Amendment purposes to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269 n. 6.

Second, to distinguish between "protected" religious speech and "less protected" religious worship would require the government and courts to delve deeply into a religious group's affairs in violation of the Establishment Clause:

> [E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer (citations omitted). Merely to draw the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases (citations omitted).

Widmar, 454 U.S. at 269 n. 6.

The third reason this Court gave in *Widmar* was that there is no good reason to protect "religious speech" only and not to protect "religious worship" under the Constitution.

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Widmar, 454 U.S. at 269, n. 6.

This Court should grant review and reject the Ninth Circuit's unconstitutional distinction between religious services, which it allows the County to ban from the forum, and religious speech, which it permits in a concession to this Court's decisions in *Good News Club* and *Lamb's Chapel.*

Also, this Court should repudiate the conclusion that the reference to "mere religious worship" in *Good News Club* means that government may single out "mere religious worship" and exclude it from a forum broadly open to all.

II. THE NINTH CIRCUIT'S DECISION THAT A FORUM OPENED BROADLY FOR ADVOCACY IS ONLY A "LIMITED FORUM" FROM WHICH THE GOVERNMENT MAY EXCLUDE RELIGIOUS EXPRESSION CONFLICTS WITH THE RULINGS BY THE FIRST, THIRD, FOURTH, FIFTH AND EIGHTH CIRCUITS.

The Ninth Circuit also erred by broadly expanding the definition of a "limited forum," to allow the County to exclude disfavored speech under the permissive "reasonableness" test. The Ninth Circuit in essence ruled that one exclusion from a forum opened broadly to community groups constitutes only a "limited forum" and not a "designated public forum." The Ninth Circuit upheld the County's exclusion of "religious services" from its forum in the library meeting rooms opened by policy for a wide range of topics – "educational, cultural or community interest." The Ninth Circuit ruled that this broad forum was only a "limited forum," because it excluded one thing - religious services, and that exclusion passed the reasonableness test. By refusing to find that the County had created a "designated public forum," the Ninth Circuit avoided evaluating this content-based exclusion under the compelling state interest test, as *Widmar* requires.

At least five other circuits have found similar policies to create a "designated public forum," where exclusions of religious expression are content-based discrimination that must be justified by a compelling state interest.[1] This Court should grant review and reject the Ninth Circuit's distortion of the First Amendment's forum doctrine.

A. Other Circuits Have Held Unconstitutional Government Exclusion of Religious Expression From Forums Opened by Policies Similar to This One.

Contra Costa County, by policy and practice, allows community groups to meet in the meeting rooms of its library buildings for meetings, programs or activities of "educational, cultural or community interest" App.108a. The Ninth Circuit found this to be only a "limited forum," App. 15a and 22a. In contrast, this Court and at least five other circuits have found that similar policies created "designated public forums," which meant that the government entities in those cases had to justify their exclusions of religious expression under the compelling

---

[1] This Court uses a forum analysis in deciding claims of access to public property for expressive activities. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 797 (1985). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property traditionally open to assembly and debate, such as public streets and parks. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] ... for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981) and school board meetings opened for citizen input, *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

state interest test. However, with completely circular logic, the Ninth Circuit ruled that this forum is only a limited forum, because it excludes religious services, which means that the exclusion need only be reasonable and viewpoint neutral. App.15a-18a. The Ninth Circuit upheld the exclusion of religious services under the permissive "reasonableness" test, and also found the exclusion to be viewpoint neutral because it banned all religious worship. App. 19a-24a.

The Ninth Circuit's decision on the nature of the forum conflicts with this Court's decision in *Widmar v. Vincent,* 454 U.S. 263 (1981) and the Eighth Circuit's decision which *Widmar* upheld. *See Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980). *Widmar* should control the result here. The policy at issue in *Widmar* permitted students to hold meetings on campus for "political, cultural, educational, social and recreational events," but barred religious worship services, *Chess v. Widmar*, 635 F.2d at 1312. This policy is similar to the policy in this case. This Court and the Eighth Circuit both ruled the University of Missouri had created a designated public forum for students, with an unconstitutional content-based exclusion of religious worship.

The Ninth Circuit's decision here also conflicts with the First Circuit's ruling in *Grace Bible Fellowship v. Maine School Administrative District No. 5,* 941 F.2d 45 (1st Cir. 1991). (Then-Chief Judge Breyer joined the panel decision in this case). In that case, the First Circuit held that a Maine school district had created a designated public forum (941 F.2d at 47) when it opened its buildings for meetings by youth groups, community, civic and service organizations, government

agencies, educational programs, and cultural events,[2] and struck down its exclusion of religious expression from that forum. A school district in Maine rejected a local church's request to rent the high school to invite the community for a free Christmas meal because the event included prayer and religious preaching on the true meaning of Christmas. The First Circuit ruled that the school district violated the church's First Amendment rights with its policy prohibiting community groups from leasing school facilities "for the direct advancement of religion." The First Circuit called the school district's actions "censorship," 941 F.2d at 48, and an "elementary violation" of the First Amendment. *Id.*

The Ninth Circuit's ruling here also conflicts with the decision of the Third Circuit in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990). In that case, the Third Circuit ruled that a suburban Philadelphia school district had created a designated public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions. 907 F.2d at 1372-73. The Third Circuit ruled that the school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by an illusionist who preaches the Christian gospel message to the audience. The Third Circuit declared unconstitutional the policy exclusion which prohibited community groups from using school facilities "for religious service[s]." 907 F.2d at 1373.

The Ninth Circuit's ruling also conflicts with the ruling of the Fourth Circuit in *Fairfax Covenant Church v. Fairfax*

---

[2] The text of the Maine school district's policy does not appear in the First Circuit's opinion, but it was in the record before that Court and is taken from the Brief of Appellees, pp. 9-10.

County School Bd., 17 F.3d 703 (4th Cir. 1994). In that case, the Fourth Circuit ruled that a school district had created a designated public forum by its policy permitting meetings by cultural, civic and educational groups, as well as political organizations. 17 F.3d at 707 (applying *Widmar* to the facts of the case). The Fourth Circuit applied the compelling state interest test and declared unconstitutional the school district's policy that required churches to pay more than nonreligious groups to rent school buildings.

The Ninth Circuit's ruling here also conflicts with the decision by the Fifth Circuit in *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989). In that case, the Fifth Circuit ruled that a public library had established a designated public forum with its policy permitting meetings of a "civic, cultural or educational character." 883 F.2d at 33-34. The library's policy also expressly excluded religious expression. The Fifth Circuit found the religious exclusion violated the First Amendment when it excluded a woman's prayer group from meeting in the library's auditorium for a group prayer meeting. 883 F.2d at 34.

Additionally, at least five district courts in Nevada, Kansas, Wyoming, New York and Alabama have ruled that school districts violated the First Amendment by excluding religious worship services from public schools generally open for expressive activities by community groups:

Church worship services may not be excluded from a forum generally opened to the public:

-- *Wallace v. Washoe County School District,* 818 F.Supp. 1346 (D. Nev. 1991) (school district may not prohibit a church from meeting in a school for Sunday morning worship services because school is generally open for use by community groups).

-- *Country Hills Christian Church v. Unified School District No. 512*, 560 F.Supp. 1207 (D. Kan. 1983) (school district may not deny church access to the school's public forum so a church can hold worship services).

Private baccalaureate services may not be excluded from a forum generally opened to the public:

-- *Shumway v. Albany School District No. 1,* 826 F.Supp. 1320 (D.Wyo. 1993) (school district must open its public forum to a private baccalaureate service for the graduating seniors).

-- *Randall v. Pegan,* 765 F.Supp. 793 (W.D.N.Y. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

-- *Verbena United Methodist Church v. Chilton County Board of Education,* 765 F.Supp. 704 (M.D.Ala. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

The Second Circuit made the same error that the Ninth Circuit did in defining a "limited forum." The Second Circuit ruled in *Bronx Household of Faith* that a forum opened generally for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," is only a "limited forum." *Bronx Household,* 331 F.3d at 346 and 351. Therefore, two circuits (the Second and the Ninth) ruled that a forum like the one in this case created only a limited forum.

However, five federal circuit courts (the First, Third, Fourth, Fifth and Eighth) and five district courts have disagreed and ruled that such a policy created a designated public forum. Those courts judged the content-based exclusions against religious expression using the compelling state interest test.

Those courts ordered school districts and a public library to permit religious worship and instruction in forums created by policies very similar to the one in this case. Yet the Ninth Circuit upheld the exclusion of religious services. This Court should grant review in this case to resolve the conflict between the Ninth Circuit's decision and the cases described above, and to confirm that religious services cannot be excluded from a forum generally open to the public for expressive activity.

B. The Policy Does Not Create a Limited Forum.

This Court should grant review to correct the Ninth Circuit's distorted concept of a "limited forum." The Ninth Circuit reasoned that if the government excludes just a few categories of subject matter from a forum generally opened for all other expression, the forum is only a "limited forum," and the exclusion will be upheld if it is reasonable and viewpoint neutral. App. 19a-20a.[3] Such reasoning neutralizes this Court's

---

[3] The Ninth Circuit erred when it stated that this Court in *Good News Club* "adopted the Second Circuit's conclusion that the State of New York had created a limited public forum when it made its public schools available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'" App. 16a. In fact, this Court specifically declined to rule whether the New York state law at issue in *Good News Club* created a designated public forum or not, and simply accepted the parties' stipulation that state law created a "limited forum:" "We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. See *Lamb's Chapel, supra,* at 391-392. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, ... we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum." *Good News Club*, 533 U.S. at 106. In fact, this Court stated in *Lamb's Chapel* that the argument that a policy and practice like the one here creates a designated public forum "has considerable force, for the District's property is heavily used by a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 392 (emphasis added).

forum doctrine and First Amendment protection for speakers because any exclusion of disfavored speech from the forum instantly transforms it into a mere "limited forum." The Ninth Circuit circumvents the First Amendment by allowing government to exclude any disfavored speakers or subject matter from a forum generally opened to all, and then claiming it has only a "limited forum" because it excludes some speech. The exclusions then are judged under the more lenient "reasonableness standard" rather than under the compelling state interest test.

This Court should take this case to stop the confusion or misuse of the "limited forum." This Court should state that one or a few exclusions from a forum generally opened to the public for expression does not make it a "limited forum." In order to create a genuine "limited forum," the government must limit the forum to a clear category of people (*e.g.*, students or government employees), or a clear category of subject matter (*e.g.*, the agenda before a town council meeting, or a government theater dedicated to Shakespearean-era plays only), and then exclude all other speakers and subject matters.

Judge Bybee in his dissent makes this same point by stating that there are "perfectly permissible means by which categories of speech-including worship activities-could be excluded from the library." App. 99a. He gave as examples, " if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings." *Id.*

This Court should grant the petition to reject specifically the notion that government creates a "limited forum" by excluding one category or a few categories of subject matter from a forum generally opened to the community for expressive activities.

CONCLUSION

For the reasons expressed above, petitioners respectfully ask this Court to grant the petition for writ of certiorari to the Ninth Circuit.

Respectfully submitted,

BENJAMIN W. BULL*
JORDAN W. LORENCE
GARY S. MCCALEB
KEVIN THERIOT
ALLIANCE DEFENSE FUND
15333 N. Pima Road,
Suite 165
Scottsdale, Arizona 85260
(480) 444-0028
* Counsel of Record

TIMOTHY D. CHANDLER
ALLIANCE DEFENSE FUND
101 Parkshore Dr.,
Suite 100
Folsom, California 95630
(916) 932-2850

TERRY L. THOMPSON
LAW OFFICES OF
TERRY L. THOMPSON
P.O. Box 1346
Alamo, California 94507
(925) 855-1507

June 7, 2007